Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

CARMEN REOGAS, WANDA GIBSON and KAREN HOWARD,

Petitioners,

vs.

JIMMY GRAY and MONARCH TILE, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Is an employer, pursuant to common-law principles of agency, responsible for hostile environment sexual harassment committed by a supervisory employee who uses their supervisory status to effectuate the harassment?

II. May a fact finder infer notice to an employer of hostile environment sexual harassment:

a. Through actual notice to an intermediate supervisor who reports it no further?

b. From the pervasive nature of the harassment that makes it actionable?

c. By default through its failure to effectively disseminate any sexual harassment policy and instructions about how and to whom victims should complain?

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Petitioners Carmen Reogas, Wanda Gibson, and Karen Howard respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Eleventh Circuit filed January 6, 1998 is not published (App. A). The Order and the Memorandum of Opinion of the District Court granting summary judgment in favor of defendants are not published (App. B and C).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was filed on January 6, 1998, and a timely filed Petition for Rehearing was denied by the United States Court of Appeals for the Eleventh Circuit, which denial was filed March 10, 1998 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (Title VII), is set forth below:

> Section 2000e-2. Unlawful employment practices.
>
> (a) Employer practices.
>
> It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) To limit, segregate, or classify his employees or applicants for employment in anyway which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely, affect his status as an employee, because of such individuals race, color, religion, sex, or national origin . . .

STATEMENT OF THE CASE

This sexual harassment action was originally filed in the Circuit Court of Lauderdale County, Alabama, from which it was removed on or about September 13, 1994 (RI-1). The final amended form of the Complaint, being the Second Amended Complaint, was filed on April 4, 1995 (RI-24).

Defendant Monarch Tile, Inc. filed for summary judgment as to the claims of plaintiff Karen Howard on August 31, 1995 (RII-28); defendant Monarch Tile, Inc. filed for summary judgment on the claims of plaintiff Wanda Gibson on September 7, 1995 (RII-29); a Motion for Summary Judgment was filed by defendant Jimmy Gray as to all claims of plaintiffs on September 15, 1995 (RII-32); and defendant Monarch Tile, Inc. filed for summary judgment as to the claims of plaintiff Carmen Reogas on September 15, 1995 (RIV-34).

Plaintiffs filed oppositions to the motions for summary judgment (RIV-36); (RIV-37); (RV-40); (RV-41).

By Order entered March 21, 1996, the trial court granted summary judgment in favor of defendant Monarch Tile, Inc., Jimmy Gray, and against petitioners Carmen Reogas, Wanda Gibson, and Karen Howard, with the exception of an assault and battery claim by plaintiff Karen Howard which was subsequently settled.

By Order entered June 27, 1996, the granting of summary judgment was made final by the disposition of a remaining claim in the action concerning petitioner Karen Howard (RV-53).

A Notice of Appeal was timely filed by petitioners concerning the granting of summary judgment (RV-54).

The United States Court of Appeals for the Eleventh Circuit entered a judgment which was filed on January 6, 1998 affirming the granting of summary judgment in favor of defendants by the trial court.

A timely Motion for Rehearing was filed by petitioners, which was denied by Order of the United States Court of Appeals for the Eleventh Circuit filed March 11, 1998.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUES RAISED HEREIN CONCERNING AN EMPLOYERS RESPONSIBILITY FOR HOSTILE ENVIRONMENT SEXUAL HARASSMENT COMMITTED BY A SUPERVISORY EMPLOYEE USING THEIR SUPERVISORY STATUS TO EFFECT THE HARASSMENT IS THE SAME ISSUE AS IS CURRENTLY BEFORE THIS HONORABLE COURT IN THE CASE OF *FARRAGHER V. THE CITY OF BOCA RATON*, 97-282.

Agency principles have been applied in this area of the law. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986). Among those agency principles applicable to hostile environment sexual harassment is the one that, "[i]n tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden." Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. Rev. 345, 348 (1891). The Courts of Appeal, however, have diverged on which agency principles to apply and how to apply them.

Petitioners herein, as did petitioner Beth Ann Farragher in *Farragher v. The City of Boca Raton*, 97-282 urge this Court to hold that employer liability for hostile environment sexual harassment by a supervisor arises from one or both of two bases. The first ground for liability is for a supervisor's abuse of his authority, and is contained in Section 219(2)(d) of the Restatement (Second) of Agency (1958). The second basis is knowledge, either actual or constructive.

Section 219(2)(d) makes an employer liable for a supervisors use of his supervisory authority, implicit or explicit,

to visit his sexual harassment on those who work for him. Whether the supervisor is abusing that power is a fact intensive inquiry that necessarily would take into account the nature of the supervisors powers, the circumstances of the harassment, and the proven efficacy of any anti-harassment program.

The knowledge for which petitioners seek to hold the employer herein liable is that of three kinds:

(1) Actual knowledge, through an employee whose job it reasonably should be to report the harassment up the line;

(2) Constructive knowledge that a fact finder may (but does not have to) infer from the pervasiveness requisite to make the harassment actionable to begin with;

(3) Constructive knowledge arising out of an employers failure to put into place — and to activate, when appropriate, an effective sexual harassment policy mechanism that includes a zero — tolerance policy, and effective and discrete avenue of complaint and remedial action that is both prompt and effective.

Plaintiff Karen Howard began working at Monarch Tile, Inc. in August of 1991. (RIV-36-9). Plaintiff Karen Howard became a "press operator" on a production line in October of 1991, in which position she was supervised by defendant Jimmy Gray (RIV-36-10). In August of 1991, a few days after plaintiff Karen Howard began working at defendant Monarch Tile, Inc., defendant Jimmy Gray asked her if she had plans for the weekend, and asked if she was going to be going out with him. (RIV-36-12, 13). In November of 1991 defendant Jimmy Gray inquired of plaintiff Karen Howard whether she was "shacking up" with her boyfriend. (RIV-36-14, 15). No later than February of 1992 plaintiff Karen Howard was popped on her buttocks by defendant Jimmy Gray while plaintiff was in his office to pick up paper towels (RIV-36-16, 17 and 18).

Plaintiff Karen Howard sternly rebuked defendant Jimmy Gray after he popped her on the buttocks, however, following this incident defendant Jimmy Gray began to harass and attempt to intimidate plaintiff Karen Howard by interfering with the machinery upon which she worked, by maladjusting the dials on the machinery upon which plaintiff worked, by staring at her in an intimidating fashion, and by screaming and yelling at her without justification or provocation. (RIV-36-19).

In December of 1992 plaintiff Karen Howard had taken the inappropriate conduct as long as she could tolerate it, and she transferred to another department where she would not be supervised by defendant Jimmy Gray, notwithstanding which, defendant Jimmy Gray continued to attempt to intimidate her by staring at her and walking by staring at her at her new job location. (RIV-36-20). Plaintiff Karen Howard called the inappropriate conduct of defendant Jimmy Gray to the attention of her employer defendant Monarch Tile, Inc. by direct notification to Larry Puller, the Personnel Director of defendant Monarch Tile, Inc. (RIV-36-21, 23). After notifying Personnel Director Larry Puller of the incident involving defendant Jimmy Gray, her relationship with defendant Jimmy Gray deteriorated further. Defendant Monarch Tile, Inc. was also placed upon notice of the offensive conduct of defendant Jimmy Gray by a written grievance filed by plaintiff Karen Howard which set out in detail the wrongful conduct of defendant Jimmy Gray (RIV-36, 28-31).

Larry Puller, the Personnel Director of defendant Monarch Tile, Inc. has no memory of any policy concerning sexual harassment having been posted by Monarch Tile, Inc. After Larry Puller (the Personnel Director of Monarch Tile, Inc.) was notified of the Jimmy gray incident by plaintiff Karen Howard, and following a meeting concerning the written grievance filed by plaintiff Karen Howard, no disciplinary action was taken

against defendant Jimmy Gray at all. (RIV-36-4). Larry Puller further testified that no formal counseling or professional counseling was required of defendant Jimmy Gray concerning the sexual harassment issues (RIV-36-4). Larry Puller told plaintiff Karen Howard that defendant Jimmy Gray had been warned in the past about not harassing the women employees (RIV-36-23).

Dorothy Simpson, the union representative, testified that after the allegations were made by plaintiff Karen Howard against defendant Jimmy Gray, that Dorothy Simpson was ordered to "monitor Jimmy Gray and make sure that he did everything properly" (RIV-36-4). Dorothy Simpson did not give any counseling or instruction on sexual harassment or how to avoid it to defendant Jimmy Gray, and Dorothy Simpson knows of no formal counseling of defendant Jimmy Gray following plaintiff Karen Howards allegations of sexual misconduct by defendant Jimmy Gray; Dorothy Simpson is employed by defendant Monarch Tile, Inc. picking up tile, and is not a counselor of any kind. (R-36-4).

Henry Stamper, Production Manager for defendant Monarch Tile, Inc. testified that prior to the incident involving plaintiff Karen Howard, he was aware of allegations made by a former female employee of defendant named Henrietta Fulks concerning alleged sexual impropriety on the part of defendant Jimmy Gray (RIV, 36, 45), Mr. Stamper met with plaintiff Karen Howard concerning her allegations that defendant Jimmy Gray sexually mistreated her and verbally abused her, and concerning the other allegations contained within the written grievance filed by plaintiff Karen Howard against defendant Jimmy Gray, however, Mr. Stamper indicated that no action *i.e.* no discipline or counseling was taken against defendant Jimmy Gray because in his judgment the only "sufficient proof" concerning allegations of sexual harassment would be if he himself saw the

offending act, or if two or more employees observe the improper conduct (RIV-36-45-47).

Plaintiff Wanda Gibson began working in the spray department of Monarch Tile, Inc. in February of 1993 (RIV-37-11). Plaintiff Wanda Gibson was initially assigned to work as a fettler, and to pick up tile as it came off the production line. In April of 1993 she completed her probationary period and became a full time employee in the spray department under the supervision of defendant Jimmy Gray (RIV-37-11-12).

Continually from April of 1993 until October of 1993 defendant Jimmy Gray attempted to date plaintiff Wanda Gibson, and defendant Jimmy Gray frequently called her at home, and when defendant Jimmy Gray would leave messages at her home, plaintiff Wanda Gibson would return those calls out of fear that if she did not call him back "he would be nasty the next day at work." (RIV-37-14, 15 and 16). During the entire time that plaintiff Wanda Gibson was employed at defendant Monarch Tile, Inc., defendant Jimmy Gray would walk up to her, touching her on the leg or hip area in an unconsented fashion, leaning against her, and brushing against her, and on one occasion during the summer of 1993 defendant Jimmy Gray came to plaintiff Wanda Gibson's house on a Saturday morning without her prior permission, and defendant Jimmy gray walked into the house without knocking and hugged plaintiff Wanda Gibson, and tried to talk her into hugging him back; plaintiff protested and asked defendant Jimmy Gray to leave, which he did. (RIV-37-19, 20).

Defendant Jimmy Gray also told vulgar jokes with sexual content and asked personal questions of plaintiff Wanda Gibson such as "did you have a honeymoon last night?" (RIV-37-25, 26). Defendant Jimmy Gray got married in October of 1994, after which he stopped asking plaintiff Wanda Gibson for dates,

however, he continued to brush up against her, thus touching her in an unconsented fashion, and continued to tell dirty jokes. (RIV-37-17, 18 and 19). Defendant Jimmy Gray also required plaintiff Wanda Gibson to stick out her tongue at work, and required other female employees to stick out their tongues at work as some form of a vulgar joke activity. (RIV-37-22, 23).

Plaintiff Wanda Gibson was discharged from her employment at defendant Monarch Tile, Inc. on or about February 15, 1994 for alleged excessive absenteeism. (RIV-37-34, 35). The said absenteeism policy was not contained in the Collective Bargaining Handbook, but rather was issued as a memo prior to the time that plaintiff Wanda Gibson began to work at Monarch Tile, Inc. which memo was characterized as a clarification of the rule commonly known as "the twenty day rule". Plaintiff Wanda Gibson had been told by Dorothy Simpson, the union representative, that if "you filed a grievance against Jimmy Gray you usually lost your job." (RIV-37-29). Dorothy Simpson further told plaintiff that if she got in trouble with Jimmy "your out of here", and plaintiff testified that she believed it since it was told to her by her union representative. (RIV-37-29).

Plaintiff was fired on or about February 18, 1994, and in February she spoke with Larry Puller the Personnel Director of Monarch Tile, Inc., (an individual involved in the firing process) during which conversation Larry Puller told plaintiff Wanda Gibson that he understood she was going to be making sexual harassment charges, and that he would have to be charged as well, however, plaintiff explained to him that she had no accusations of sexual harassment against Larry Puller, individually, but that the charges were against defendant Jimmy Gray. (RIV-36-30). Dorothy Simpson, the union representative, has testified that defendant Jimmy Gray brought up the number of days missed by plaintiff Wanda Gibson, shortly prior to her

termination, and asked that the matter be looked into. (RIV-37-4). The wrongful conduct of defendant Jimmy Gray occurred while he was allegedly being monitored by Dorothy Simpson, following the prior allegations having been made by plaintiff Karen Howard (RIV-37-1-8). Larry Puller, Personnel Director, has testified that he does not know of any sexual harassment policy was posted during anytime that plaintiff Wanda Gibson was employed at Monarch Tile, Inc. (RIV-37-5). At the time that plaintiff Wanda Gibson was fired she was not involved in any disciplinary proceeding such as is required by the twenty day rule, and she had several excused absences, and in fact the final absence was due to medical reasons (RIV-37-5-6). At the time that plaintiff Wanda Gibson was terminated no union representative was present. (RIV-37-6-7). Plaintiff Carmen Reogas testified about pervasive sexual harassment by defendant Jimmy Gray during the months before Wanda Gibson was terminated. (RIV-37, 7).

Plaintiff Carmen Reogas was hired by defendant Monarch Tile, Inc. in April of 1992, and began working as a fettler; a fettler job is to sandpaper the edges of tile that are stacked in racks. (RV-41-2). Plaintiff Carmen Reogas remained in this position for an initial forty-five day probationary period at the end of which she was permitted to bid on jobs in a variety of departments throughout defendant Monarch Tile, Inc.; the first job in which she bid successfully was relief pickup person in the spray department which was the first job in which plaintiff Carmen Reogas was supervised by defendant Jimmy Gray (RV-41-2).

Plaintiff Carmen Reogas, beginning in September of 1993 was sexually harassed by defendant Jimmy Gray in that he would comment upon the fact she was not getting married because her boyfriend was "getting exactly what he wants", and defendant Jimmy Gray would ask if plaintiff Carmen Reogas "got pregnant over the weekend." (RV-41-2).

In January and February of 1994 defendant Jimmy Gray telephoned plaintiff Carmen Reogas at her home without her prior consent, defendant Jimmy Gray having obtained the phone number through the business records at defendant Monarch Tile, Inc. The purpose of the call was to ask plaintiff Carmen Reogas whether in her opinion defendant Jimmy Gray should go to the house of plaintiff Wanda Gibson. (RV-41, 2, 3). During January or February of 1994 plaintiff Carmen Reogas was standing at the production line doing her job when defendant Jimmy Gray leaned over and asked whether she would open up her blouse, and when plaintiff asked why defendant Jimmy Gray replied "so he could see," and plaintiff replied "I don't think so" and turned around and walked off. (RV-41-3). Defendant Jimmy Gray required plaintiff Carmen Reogas to stick out her tongue at work apparently based upon something defendant Jimmy Gray had seen on TV about a homosexual woman having bitten off the tongue of her lover. (RV-41-3).

Plaintiff Carmen Reogas was also subjected to unwanted physical contact when defendant Jimmy Gray would touch her in the breast area with his arms and that he would walk past her and brush his hand across her buttocks, during which instances defendant Jimmy Gray would get too close to plaintiff Carmen Reogas brushing up against her in an offensive manner, hitting her breast with his arms and when she would attempt to move away he would say "you can't see it from that light. You need to get back over here." (RV-41-3,4).

A formal grievance was filed by plaintiff Carmen Reogas concerning sexual harassment by defendant Jimmy Gray (RV-41-3, 4). Prior to filing a grievance plaintiff Carmen Reogas had been told by Dorothy Simpson, the union vice president and union representative, that if you crossed defendant Jimmy Gray you would lose your job, so plaintiff Carmen Reogas attempted to deal with the sexual harassment on her own as

long as she could tolerate it. (RV-41-4). After filing a formal grievance alleging sexual harassing behavior on the part of defendant Jimmy Gray, defendant Jimmy Gray began to treat plaintiff Carmen Reogas more harshly, even though the sexual nature of the misconduct ended. Defendant Jimmy Gray would yell at plaintiff Carmen Reogas, stare at her, restrict her movement to her work area, and not allow her to leave her work station, and on one occasion she was forced to remain at her work station during her menstrual period, as a result of which she soiled herself. (RV-41-4).

During the entire time plaintiff Carmen Reogas was employed at defendant Monarch Tile, Inc. she never saw any posted sexual harassment policy, neither was she ever given any type of written or verbal instruction as to how to handle a sexual harassment situation, or to whom to report it. (RV-41-4).

On or about July 16, 1994 a hearing was scheduled concerning the sexual harassment grievance that had been filed by plaintiff Carmen Reogas against defendant Jimmy Gray, at which hearing Justin Pauley, A.Q. Harville, Jimmy Gray, Dorothy Simpson, Henry Stamper, and Larry Puller were present, along with the past union president; during this meeting plaintiff Carmen Reogas requested to be allowed to present witnesses, however, Justin Pauley, on behalf of defendant Monarch Tile, Inc., refused to allow plaintiff to call witnesses (RV-41-4, 5). During the time that plaintiff Carmen Reogas was an employee of defendant Monarch Tile, Inc. she did not invite any sexually improper behavior from defendant Jimmy Gray, and at all times plaintiff considered the sexually harassing behavior inappropriate and offensive. (RV-41-5). Henry Stamper, Production Manager at defendant Monarch Tile, Inc., told plaintiff after she filed her grievance concerning sexual harassment by defendant Jimmy Gray and concerning her

complaints made directly to Mr. Stamper about defendant Jimmy Gray hanging around plaintiff and staring at her, that Jimmy Gray was not doing anything improper because Mr. Stamper stated "hadn't I ever seen anyone that I wanted to stare at", and that Jimmy Gray was "not going to bite her". (RV-41-5).

At the final meeting at which plaintiff Carmen Reogas was fired, Jimmy Gray, Henry Stamper, and Dorothy Simpson were present. The meeting was to discuss an altercation involving plaintiff and a co-worker. When the door was about to be closed plaintiff made it known that plaintiff was not comfortable with this group, and that she did not feel comfortable and requested to tape record the meeting so as to make an honest record thereof, however, the taping was refused. Plaintiff was ordered to turn the tape off by Mr. Henry Stamper on behalf of defendant Monarch Tile, Inc., and when she refused to turn the tape off she was immediately terminated (RV-41-5,6).

Longstanding principles of agency, overlaid on the facts of the case at bar should mean that liability should be found as to the employer. The Court of Appeals for the Eleventh Circuit erred when it apparently applied to the instant case liability rules palpably different from the established principles of agency law.

CONCLUSION

This case presents questions of importance which questions are presently before this Court in the case of *Farragher v. The City of Boca Raton*, 97-282, and therefore petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 6, 1998

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-6767

District Court No. CV 94-B-2216

CARMEN REOGAS, WANDA GIBSON, KAREN HOWARD,

Plaintiffs-Appellants,

versus

JIMMY GRAY, MONARCH TILE, INC.,

Defendants-Appellees,

ALUMINUM BRICK AND GLASS WORKERS INTERNATIONAL UNION, Local No. 511,

Defendant.

Appeal from the United States District Court for the Northern District of Alabama

Before DUBINA, Circuit Judge, HILL and GIBSON*, Senior Circuit Judges.

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* Honorable John R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit sitting by designation.

Appendix A

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the **judgment** of the said District Court in this cause be and the same is hereby **AFFIRMED**;

It is FURTHER ORDERED THAT plaintiffs-appellants pay to the defendants-appellees, the costs on appeal to be taxed by the Clerk of Court.

Entered: January 6, 1998
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/19/98

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHWESTERN DIVISION FILED MARCH 21, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

CASE NO. CV 94-B-2216-NW

CARMEN REOGAS, et al.,

Plaintiffs,

v.

JIMMY GRAY, et al.,

Defendants.

MEMORANDUM OPINION

Currently before the court are the motions of defendant, Monarch Tile, Inc. ("Monarch"), for summary judgment; the motion of defendant, Aluminum, Brick & Glass Workers International Union Local No. 511 ("Union"), for summary judgment; and the motion of defendant, Jimmy Gray ("Gray"), for summary judgment.[1] Upon consideration of the record, the submissions of the parties, the argument of counsel, and the relevant law, the court is of the opinion that Monarch's and the Union's motions for summary judgment are due to be granted and Gray's motion for summary judgment is due to be granted in part and denied in part.

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1. Also before the court is Monarch's motion to dismiss. However, because the court finds that Monarch's motions for summary judgment are due to be granted, its motion to dismiss is moot.

Appendix B

This dispute arises out of defendant Gray's allegedly unlawful behavior toward plaintiffs. All three plaintiffs allege that defendants Monarch and Gray are liable for the torts of assault and battery, invasion of privacy, and negligent supervision or failure to terminate.[2] In addition, plaintiffs Gibson and Reogas assert claims against defendant Monarch[3] for violations of Title VII of the Civil Rights Act of 1964 for unlawful sex discrimination and retaliation and against defendants Monarch and the Union for violations of Section 301 of the Labor Management Relations Act and the duty of fair representation.

FACTUAL SUMMARY

Monarch manufactures ceramic tile at its plant in Florence, Alabama. (Puller[4] Decl. submitted in support of Monarch's motion for summary judgment on claims of Karen Howard ("Howard Puller Decl.")). The production employees at Monarch, including plaintiffs, were represented by the Union at all times relevant to this suit. (*Id.*) During plaintiffs' employment, the terms and conditions of their employment were

2. Plaintiffs also allege in the Second Amended Complaint ("Complaint") that defendants Monarch and Gray are liable for the tort of outrage. However, at oral argument, plaintiffs conceded that Gray's conduct did not rise to the level required to state a cause of action for the tort of outrage.

3. Plaintiffs Gibson and Reogas also allege in Count VII of the Complaint that defendant Gray is liable under Title VII. However, in their brief in opposition to Gray's motion for summary judgment, Gibson and Reogas concede that there is no individual liability under Title VII and that summary judgment as to that claim is due to be granted.

4. Lawrence E. Puller is the Personnel Manager of Monarch.

governed by a collective bargaining agreement ("CBA") between Monarch and the Union. (Ex. B attached to Monarch's motion for summary judgment on claims of Karen Howard). A clarification of Article XXIII, Rule No. 3, of the CBA became effective on March 17, 1992 and provides that "an employee missing in excess of twenty days" a year will be discharged. (Ex. 8 attached to Monarch's motion for summary judgment on claims of Wanda Gibson).

Ms. Dorothy Simpson is the union steward at one of two facilities comprising the Monarch plant. (Simpson Dep. at 5-6). According to Simpson, she introduces herself to each new member, gives her a copy of the CBA, informs her of when the union meetings take place, and offers her assistance. *(Id.* at 9). The grievance procedure provided for in the CBA is a four-step process, culminating in arbitration. (CBA at 36-42). Any grievance not resolved immediately with the foreperson must be reduced to writing within five days and submitted to the plant superintendent. *(Id.* at 36-37).

Plaintiff Karen Howard

Plaintiff Howard began working at Monarch in August of 1991. (Howard Dep. at 24). She was initially assigned to "pick-up" duty but successfully bid on an automatic press operator's position following her 45-day probationary period. *(Id.* at 25-26). In each of these positions she was supervised by defendant Gray. *(Id.* at 26).

Howard alleges that in August of 1991, a few days after she began working at Monarch, Gray asked her if she had any plans for the weekend and when she asked what he meant, he said, "[w]ell, you and I are going out, right? (Howard Dep. at

33-34). Howard says that she responded, "I don't think so, . . . I think Jim Clemmons would kill us both." (*Id.* at 34). According to Howard, she was dating Clemmons, whom Gray knew. *(Id.)* Howard alleges that Gray responded, "Oh no he wouldn't," and the conversation ended. *(Id.)*

Howard next alleges that shortly after she was transferred to the press operator's job, Gray commented to her, "So, you and Jimmy boy aren't shacking up anymore," to which Howard responded, "[w]ell, no" and walked off. (Howard Dep. at 38-39). According to Howard, she resented Gray's commenting about an aspect of her personal life. *(Id.* at 39).

With regard to physical contact, Howard alleges that between November of 1991 and February of 1992, she bent down to reach for paper towels in a cabinet behind Gray's chair and as she started to stand back up, Gray "popped [her] on the butt with his hand." (Howard Dep. at 40-42, 50; Howard Aff. ¶ 1). Howard stated that she "whirled around and said, 'I've killed for less than that. Don't you ever touch me again or I will knock your teeth down your throat.'" *(Id.* at 41). Howard testified in deposition that Gray "looked wide-eyed, and said, 'What?'" *(Id.)* According to Howard, she responded, "I didn't stutter, and you didn't miss a goddamn word," and stormed out of the office, slamming the door. *(Id.)*

Howard testified in deposition that within a couple of weeks or so after this incident, she was talking with Larry Puller, Monarch's personnel manager, about other matters and complained about Gray's behavior. (Howard Dep. at 42). According to Howard, Puller said he would "check into it" and told her that Gray had previously been warned not to "do that" to female employees. *(Id.* at 73; Howard Aff. ¶ 1). When asked

about any other offensive comments about personal matters or touching following this incident, Howard responded that she could not think of any. (Howard Dep. at 46, 127-28).

Nevertheless, Howard alleges that her relationship with Gray continued to deteriorate following her conversation with Puller. (Howard Dep. at 73-74). In particular, Howard alleges that Gray began harassing her by "mess[ing] with the dials" on her machine, changing her tile counter to zero, and otherwise interfering with her work for no apparent reason. *(Id.* at 43; Ex. D attached to Monarch's motion for summary judgment on claims of Karen Howard ("Howard's Grievance")). In addition, Howard alleges that Gray would scream and holler at her a lot and question her absence when she left to use the restroom. (Howard Dep. at 74). On one occasion, Howard alleges that Gray docked her pay for returning from lunch just a few minutes late, despite the fact that she had always been on time before. *(Id.* at 80; Howard Grievance). Howard testified that while under Gray's supervision, she had a lot of nightmares about him and that she had only a few nightmares about him after her transfer away from his supervision. (Howard Dep. at 146-47). However, Howard acknowledged that she did not seek counseling or psychiatric care as a result of the nightmares, nor did she take any medication for them. *(Id.* at 147-48). Howard also acknowledged that Gray generally treated all of the employees under his supervision in a degrading manner. *(Id.* at 97).

Howard filed a grievance in October 23, 1992, in which she complained about all of the incidents she alleges in the Complaint. (Howard's Grievance). Puller testified that he was not aware of any disciplinary action taken against Gray with respect to Howard's claims after she filed her grievance. (Puller Dep. at 18). In December of 1992, Howard transferred to another

position at Monarch and was no longer under Gray's supervision. (Howard Dep. at 111). Howard testified that after her transfer, Gray's harassment of her ended, with the exception of his staring at her from the end of her production line one time. *(Id.* at 111-12). Puller also testified that he sent out a sexual harassment policy to be posted on the bulletin board at Monarch and stated in his Declaration discussing plaintiff Gibson that the policy was posted by November of 1992. *(Id.* at 8; Puller Declaration submitted in support of Monarch's motion for summary judgment on claims of Wanda Gibson ¶ 2). Howard filed this lawsuit on August 10, 1994.

Dorothy Simpson, the union representative, testified in deposition that following Howard's complaints about Gray's behavior, she was asked to "monitor Jimmy Gray and make sure that he did everything properly." (Simpson Dep. at 43-44). Simpson then began meeting with Gray regularly to ask about any complaints and to monitor how the department was getting along, in general. *(Id.* at 44-45). Simpson acknowledged that she did not counsel Gray on sexual harassment during these meetings or instruct him as to how to avoid it. *(Id.* at 45). In addition, Simpson stated that she did not know of any counseling that had been ordered by Monarch with respect to Gray's behavior toward either Howard or plaintiff Reogas. *(Id.* at 45-46).

Henry Stamper, production manager for Monarch, testified that prior to the incidents involving Howard, he was aware of allegations made by a former employee, Henrietta Fulks, concerning alleged sexual impropriety on the part of Gray. (Stamper Dep. at 9). However, according to Stamper, Fulks left Monarch in 1978, and he did not hear of Fulks' allegations until some time after she had left. *(Id.)* Stamper also stated

in deposition that although he discussed complaints about Gray's behavior with Gray, he never ordered separate counseling for him. *(Id.* at 50). When asked what proof he would consider sufficient to prove the allegations, he stated that he would consider the proof sufficient if he had seen the alleged incidents or if two or more people stated that they had occurred. *(Id* at 33).

Finally with regard to Howard, Gray testified in deposition that he never touched Howard or slapped her on the buttocks at work, though he was aware that she filed a grievance saying he had. (Gray Dep. at 13). Gray also stated that he was told to work closely with Simpson and to check with her any time he thought there was a problem in the department. *(Id.* at 27).

Plaintiff Wanda Gibson

Plaintiff Wanda Gibson ("Gibson) began her employment at Monarch in February of 1993. (Gibson Dep. at 15-16). In April of 1993, she began full time in the spray department under Gray's supervision. *(Id.* at 17). Gibson alleges that Gray continually tried to date her from April until October of 1993. *(Id.* at 18). Gibson alleges that Gray "was always walking up against [her] and . . . touching [her] on the leg or something like that." (Id. at 32). She describes Gray as brushing up against her, or leaning against her with his body. *(Id.* at 45). Gibson also stated that Gray frequently called her at home, estimating that between April and October of 1993, Gray called her at home between fifteen and twenty times, trying to get her to go out with him. *(Id.* at 21, 30). Gibson testified that she called him approximately five or six times during the same period in response to calls from him, stating that she feared that if she did not call him back, he would "be nasty the next day at work."

(Id. at 21-22). Gibson further testified that Gray would ask her personal questions, such as whether she had run off her boyfriend or whether she had had "a honeymoon last night." (Id. at 26).

Gibson testified in deposition that during the summer of 1993, Gray came by her home one morning, walked in the house without knocking, gave her a hug, tried to push her onto the couch, and tried to get her to hug him. (Gibson Dep. at 33-38). Gibson stated that she objected to Gray's behavior and asked him to leave, which he did. *(Id.* at 37-38).

After Gray got married in October of 1993, Gibson testified that he stopped asking her for dates. (Gibson Dep. at 114). However, Gibson alleges that Gray continued to tell her vulgar jokes and to brush up against her physically. *(Id.)* Gibson stated that Gray did not make a habit of telling her dirty jokes but that he told her one joke, in particular, that she found shocking and vulgar. *(Id.* at 116-17). Gibson also testified in deposition that on one occasion, Gray asked Gibson and other female employees to stick out their tongue at work as some form of joke. *(Id.)* Gibson stated that Gray's behavior toward her was embarrassing and humiliating and caused her to worry about her job. *(Id.* at 114). However, she did not seek any professional help. *(Id.)*

Gibson acknowledged that Gray did not ever ask her to have sex with him or suggest that if she went with him, the purpose would be to have sex. (Gibson Dep. at 103). In addition, Gibson acknowledges that Gray never threatened her with any job detriment if she refused social or physical contact with him. *(Id.* at 105). Gibson concedes that her work station was in plain view of other employees. *(Id.* at 124-25). She testified that she believed that one or two employees had

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probably seen Gray physically touch her. *(Id* at 126). However, she was not confident that they would tell the truth, if questioned, because of fear for their jobs. *(Id.)* Both Debra Turbyfill, who worked beside Gibson on the spray pick-up line, and Patsy Curtis, who also worked with Gibson, stated that they never saw any physical contact between Gibson and Gray. (Turbyfill Decl.; Curtis Decl.). Gibson also acknowledged that she never complained about the touching until after February of 1994, when she was discharged. (Gibson Dep. at 131-32). Gibson testified that although she was certain that the other employees knew about Gray's behavior toward her, she doubted that anyone in Monarch's management knew until after she was discharged. *(Id.* at 132-33). Gray denies any improper actions toward Gibson, including trying to date her. (Gray Dep. at 38).

On February 15, 1994, Gibson was discharged, allegedly for being absent from work more than twenty days in a year. (Puller Decl. submitted in support of Monarch's motion for summary judgment on claims of Wanda Gibson ("Gibson Puller Deck") ¶ 5). Larry Puller stated in his declaration that he records each employee's absences on calendars. (*Id.* ¶¶ 3, 4; Ex. C attached to Gibson Puller Decl.). On July 30, 1993, Gibson was given a warning that she had accumulated five absences in a calendar quarter. (Ex. F attached to Gibson Puller Decl.). In addition, Dorothy Simpson, the union representative, testified in deposition that she had warned Gibson when she had seventeen absences that she had only two or three more days before she could be discharged. (Simpson Dep. at 35-37). Gibson acknowledges that Simpson stated that the days she could miss were "getting low" (Gibson Aff. ¶ 9). However, according to Gibson, there was no mention of a 20-day rule, and she assumed that she would be given disciplinary warnings prior to termination. (*Id.*) Gibson also alleges that her last

absence was because of a serious medical condition involving her back. *(Id.*¶ 11*).*

According to Puller, under the CBA, progressive discipline is required only when absences are equal to five or more in a given quarter. (Gibson Puller Decl. 17). Therefore, no warning would be given to Gibson if her absences did not exceed five in that quarter. *(Id.)* The clarification to Article XXIII, Rule No. 3, provides that at any step in the disciplinary process, an employee missing more than twenty days will be discharged. (Ex. 8 attached to Monarch's motion for summary judgment on claims of Wanda Gibson). In this case, because Gibson missed more than twenty day was subject to dismissal without going through the entire system of progressive discipline. (Gibson Puller Decl. ¶ 7). Puller also stated that on February 15, 1994, he noted that Gibson's absences exceeded the 20-day limit. *(Id.* ¶ 5). Therefore, when Gibson's daughter-in-law telephoned to report that Gibson would be absent again, Puller instructed Gray to inform the caller that Gibson had been terminated. *(Id.* ¶ 5).

Larry Puller stated in his Declaration that Monarch has had a sexual harassment policy in effect since September 1, 1986 and that a copy of the policy was posted in the plant where Gibson was employed no later than November of 1992. (Gibson Puller Decl. ¶ 2; Ex. 2 attached to Monarch's motion for summary judgment on claims of Wanda Gibson (Policy)). Gibson did not file a grievance or complain about Gray's behavior until March of 1994, a month after she was discharged. (Gibson Dep. at 53; Ex. 3 attached to Monarch's motion for summary judgment on claims of Wanda Gibson ("Gibson's Grievance")). According to Gibson, she had heard that if an employee files a grievance, particularly against Gray, she usually loses her job. (Gibson Dep. at 53, 106). Gibson filed a charge

of discrimination with the Equal Employment Opportunity Commission on May 6, 1994, alleging that Gray sexually harassed her while she worked at Monarch and that she was discharged by Gray because she refused his sexual advances. (Ex. 7 attached to Monarch's motion for summary judgment on claims of Wanda Gibson ("Gibson EEOC Charge")).

Although Gibson's grievance was not filed within five days of her discharge, an arbitration hearing was held on September 26, 1994, concerning Gibson's claims and the claims of plaintiff Denise Reogas. (Ex. 13 attached to Monarch's motion for summary judgment on claims of Wanda Gibson ("Arbitration Hr'g Tr.")). In defense of the untimeliness of her grievance, Gibson argued that she was not aware of her discharge until March 22, 1994 when she attempted to go back to work and to get a grievance form at the plant. (Gibson Dep. at 178-79; Ex. 14 attached to Monarch's motion for summary judgment on claims of Wanda Gibson at 6). A.Q. Harville, an employee of the union who handles grievances and arbitrations, stated in deposition that he was not called by Gibson until approximately six weeks after her discharge. (Harville Dep. at 5, 12). According to Harville, he advised Gibson to report to work the next day and to demand to go back to work, hoping to argue at the arbitration hearing that she had been wrongfully fired without the presence of a union employee and thereby avoid the argument that her grievance was untimely. *(Id.* at 12-16). At the arbitration hearing, however, the arbitrator ruled that Gibson had actual knowledge of her discharge in February of 1994, rejecting her claim that she did not learn of it until March 22, 1994. (Ex. 14 attached to Monarch's motion for summary judgment on claims of Wanda Gibson at 6-7). According to Harville, Gibson declined to testify at the hearing because her lawyer could not be present. (Harvey Dep. at 35-36). Because

he found her claim untimely, the arbitrator held the claim ineligible for arbitration. (Ex. 14 attached to Monarch's motion for summary judgment on claims of Wanda Gibson at 9).

Gibson contends that the Union representative, Dorothy Simpson, failed to inform her to file a grievance after she was discharged and failed to provide grievance forms for her. (Gibson Dep. at 176-79). Simpson acknowledges that Gibson called her on the day she was terminated and that she did not return Gibson's call. (Simpson Dep. at 41). According to Simpson, Gibson had an unlisted phone number which Simpson did not have. *(Id.)* Simpson testified that she waited at home that night, expecting Gibson to call, but that she never did. *(Id.)* In support of its motion for summary judgment, Monarch submitted a copy of a post-arbitration hearing brief submitted by the Union on Gibson's behalf, citing relevant contract provisions, testimony, and precedent. (Ex. 15 attached to Monarch's motion for summary judgment on claims of Wanda Gibson).

Plaintiff Carmen Reogas

Plaintiff Carmen Reogas ("Reogas") began her employment with Monarch in April of 1992 as a fettler. (Reogas Dep. at 57). After a 45-day probationary period, she successfully bid on a position as a relief pick-up person in the spray department, under the supervision of Jimmy Gray. *(Id.* at 59, 61, 67). Reogas subsequently bid to become a full-time pick-up person, a part-time spray line operator, a full-time spray line operator, and a trim line brusher. *(Id.* at 61). Each time she was successful, and in each of these positions she was supervised by Gray. *(Id.* at 61, 67-68).

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In her position as trim line brusher, Reogas had some difficulty and received verbal warnings about her failure to brush the tile with her right hand. (Reogas Dep. at 74-75; Ex. 2 attached to Monarch's motion for summary judgment on claims of Carmen Reogas ("Reogas Disciplinary Action #1")). The tile and the assembly line are configured such that the tile must be brushed with the right hand to perform the work efficiently, and Reogas is left-handed. (Reogas Dep. at 74-75). On August 17, 1993, Reogas received a disciplinary notice, stating that she continued to brush the tile improperly and that she had left the production line without being relieved, a dischargeable offense according to the notice. (Reogas Disciplinary Action #1). As a result of the notice, Reogas was given a five-day layoff and warned that any recurrence would be grounds for discharge. *(Id.)* According to Reogas, she is left-handed and the company had the responsibility to accommodate her, rather than to force her to work with her right hand. (Reogas Dep. at 100). Because of her difficulty, Reogas successfully bid on a full-time spray operator position. *(Id.* at 75).

Reogas alleges that in the fall of 1993, Gray began discussing sexual matters with her, asking if she had "gotten pregnant" over the weekends and stating, when he learned she had called off her wedding, "I told you you weren't going to get married. . . . [H]e's not going to marry you. He's getting exactly what he wants." (Reogas Dep. at 88). Reogas next alleges that on one occasion, Gray went around asking some of the women to stick their tongues out at him because he had heard a news story in which a lesbian was reported to have bitten off the tongue of her partner. (*Id.* at 123). According to Reogas, Gray was asking the women to stick out their tongues in order to see if any of the women might be the woman whose tongue was bitten off. (*Id.*) Reogas stated that she was offended by this joke. (*Id.*)

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Reogas also alleges that Gray telephoned her at her home during January and February of 1994 at least twice, the second time to ask her whether he should go over to Wanda Gibson's home. (Reogas Dep. at 112-17). During that same time period, Reogas alleges that one day as she was standing at the production line working, Gray approached her, leaning over, and told her she should "open [her] blouse" so that "he could see" *(Id.* at 118). According to Reogas, she responded, "I don't think so," and walked off. *(Id.)*

Reogas also alleges that Gray would regularly come by to inspect her tile and ask her to hold it up so that he could see it, moving close to her so that his elbow was hitting her breast. (Reogas Dep. at 125). Reogas testified that she would move, and he would say, "You can't see it from that light. You need to get back over here." *(Id.)* According to Reogas, Gray's purpose was to brush up against her. *(Id.)* Reogas further alleges that Gray would regularly walk past her and "accidentally on purpose" hit his hand across her bottom. *(Id.)*

Joyce Brooks, the union shop steward, testified that Reogas regularly conversed with Gray about sexual matters. (Brooks Decl.). According to Brooks, Reogas once asked Gray what "69" meant, though Brooks knew that Reogas knew the answer. (*Id.*) In addition, Brooks stated that Reogas on one occasion asked Gray "if it was true that the length of a man's penis was the same as the length from the tip of his middle finger to the point near his wrist where his middle fingertip is when the finger is bent down towards his wrist." *(Id.)* According to Brooks, Gray did not respond to either of these questions. *(Id.)* Finally, Brooks stated that Reogas asked Gray at one point whether his penis was as large as his shoe size. *(Id.)*

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Lisa Norton, another of Reogas' co-workers, stated in her declaration that Reogas brought various sexual trinkets to work, such as a toy frog with an oversized penis and a key chain with an ornament depicting a couple having sex. (Reogas Dep. at 256-57; Norton Decl.). Norton also stated that Reogas would regularly engage in telling off-color jokes or sexual banter. (Norton Decl.) According to Norton, other men and women who worked nearby would sometimes join in the conversation, including, on occasion, Gray. (*Id.*) However, Norton stated that she was never offended by anything Gray said during these conversations and that Reogas never complained about Gray to her. (*Id.*) Finally, Norton stated in her declaration that Reogas embarrassed her by discussing Norton's breast size with other employees. (*Id.*)

Reogas acknowledged in deposition that sexual objects and sexual topics of conversation were not unusual in the workplace at Monarch. (Reogas Dep. at 258). According to Reogas, if she did not like it, she could always walk off. (*Id.*)

Reogas admits that she did not complain to anyone in authority regarding Gray's behavior toward her until March 22, 1994, when she filed a grievance with the Union. (Reogas Dep. at 128-29; Ex. 16 attached to Monarch's motion for summary judgment on claims of Carmen Reogas). According to Reogas, before March of 1994, she tried to handle Gray by avoiding him, doing her job, and being "nice and friendly" because she had been informed by Dorothy Simpson that "if you cross over Jimmy [Gray], you won't have a job out there very long" (Reogas Dep. at 131). Reogas stated in her affidavit that she never saw any posted sexual harassment policy, nor was she given any instruction as to how to handle a sexual harassment situation or to whom to report it. (Reogas Aff.

¶ 10). In addition, she contends that while she was a member of the union, she was never given any instruction as to how to file a grievance. *(Id.* ¶ 11).

With regard to Monarch officials, Reogas alleges that after she filed her grievance and complained to Henry Stamper about Gray's conduct, Stamper stated that Gray was not doing anything improper and asked "hadn't [Reogas] ever seen anyone that [she] wanted to stare at." (Reogas Aff. ¶ 14). According to Reogas, Stamper also stated that Gray was "not going to bite [her]." *(Id.)*

After she filed her grievance, Reogas alleges that a meeting was convened involving both company and union officials. (Reogas Aff. ¶ 12). Reogas alleges that she was not permitted to present any witnesses at that meeting and that the union officials failed to demand that she be allowed to present witnesses. *(Id.)* Her claim was taken to arbitration, however, and a hearing was held on October 3, 1994. (Ex. 6 attached to Monarch's motion for summary judgment on claims of Carmen Reogas at 1). According to A.Q. Harville, the Union's regional director, Reogas refused to testify at the hearing because her counsel could not be present. (Harville Dep. at 35-36). Because the Union failed to put on any evidence, the arbitrator found that no prima facie case was established, and the grievance was denied. (Ex. 6 attached to Monarch's motion for summary judgment on claims of Carmen Reogas at 5).

Although Reogas acknowledges that all sexually offensive acts and remarks by Gray ceased following the filing of her grievance, she contends that Gray enforced disciplinary rules against her in a discriminatory and retaliatory manner. (Reogas Dep. at 163-65). In particular, Reogas alleges that Gray began

yelling at her, staring at her, and restricting her to her work area. (Reogas Aff. ¶ 9). On one occasion, Reogas alleges that she was forced to remain at her work station during her menstrual period and, as a result, soiled herself. *(Id.)*

On May 13, 1994, Reogas received a second disciplinary notice. (Ex. 8 attached to Monarch's motion for summary judgment on claims of Carmen Reogas ("Reogas Disciplinary Action #2")). According to the notice, Gray encountered Reogas talking with another employee away from her desk during his rounds. *(Id.)* When Gray instructed her to return to her station and to stop talking, the notice states that Reogas replied that Gray could write her up or fire her, but that she was not going to move. *(Id.)* Because this violation was her second within a twelve month period, Reogas received a ten-day layoff. *(Id.)* Reogas disputed this incident, refused to sign her disciplinary notice, and filed a grievance with the Union. (Reogas Disciplinary Action #2; Ex. 9 attached to Monarch's motion for summary judgment on claims of Carmen Reogas).

At around this time, Larry Puller offered to transfer Reogas to a different plant in the position of "relief spray-line operator" and "pick-up person," positions she had held before. (Reogas Dep. at 149-50). Although Reogas acknowledged in deposition that her pay would probably have remained the same, she declined the transfer, contending that she should not be the one to change jobs since she was not the wrongdoer. *(Id.* at 150). According to Puller, at the time he offered to transfer Reogas, Gray was supervising 20-25 employees, as was his counterpart in the other plant. (Puller Decl. submitted in support of Monarch's motion for summary judgment on claims of Carmen Reogas ("Reogas Puller Decl."). Therefore, moving Gray would have disrupted 40-50 supervisory relationships instead of just one. *(Id.)*

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On June 14, 1994, Reogas received another disciplinary warning, stating that she had accumulated five absences within one calendar quarter. (Ex. 10 attached to Monarch's motion for summary judgment on claims of Carmen Reogas ("Disciplinary Action #3)). The notice also stated that the disciplinary notice was her third within a year and that if she received one more before August 17, 1994, she could be discharged. *(Id.)* Again, Reogas refused to sign the notice, but it was witnessed by Dorothy Simpson. *(Id.)*

On July 16, 1994, Reogas was involved in an altercation at Monarch with Darlene Harlow, a co-worker. (Reogas Dep. at 203-10). As a result of the altercation, Reogas filed criminal charges against Harlow, which she subsequently dismissed, and Harlow filed a grievance. (Reogas Dep. at 310; Ex. 13 attached to Monarch's motion for summary judgment on claims of Carmen Reogas ("Harrow's Grievance")). Monarch's response to Harlow's grievance stated that the company "prefer[red] to correct an employee rather than terminate [her]." (Harrow's Grievance). Reogas stated that when she returned to work on the Monday following this altercation, she asked Henry Stamper to set up a meeting and he stated that one had already been set up. *(Id.* at 210). According to Reogas, Harlow was interviewed first. *(Id.)* Before Reogas' interview began, Reogas asked that Joyce Brooks be permitted to attend, but her request was denied. *(Id.* at 229). Reogas then took out a tape recorder and prepared to tape record the meeting. *(Id)* Stamper had previously instructed Reogas not to tape record conversations taking place around the plant, and upon seeing the tape recorder at the meeting, Stamper instructed Reogas to turn it off. *(Id.* at 229, 240; Stamper Dep. at 39-43). When Reogas refused to turn the tape recorder off, Stamper told her either to turn it off or take it home, meant that she would be fired. (Stamper Dep. at 43-44).

Reogas then got up and left the room. (Reogas Dep. at 230; Stamper Dep. at 43-44).

On July 19, 1994, the day after the meeting, Reogas was discharged. (Ex. 15 attached to Monarch's motion for summary judgment on claims of Carmen Reogas). The discharge notice stated that on July 16, 1994, Reogas had threatened a co-employee with bodily harm which is a major offense in the union contract, and that on July 18, 1994, Reogas failed to do as instructed by Henry Stamper, which is an act of insubordination and a discharge offense. *(Id.)* The notice went on to say that in the last twelve months Reogas had committed two major offenses and one minor offense prior to that notice; that under the union contract any combination of four offenses is cause for discharge; and that her employment was terminated. (*Id.*)

SUMMARY JUDGMENT STANDARD

Under FED. R. CIV. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The party asking for summary judgment "bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 filth Cir. 1991); *see Adickes v. S.H. Press & Co.,* 398 U.S. 144, 157 (1970).

The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the nonmoving party has failed to present evidence in support of some element of his case on which he bears the ultimate burden of proof. *Celotex,* 477 U.S. at 322-23; *see* FED. R. CIV. P. 56(a) and (b).

Once the moving party has met his burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial,' " *Celotex,* 477 U.S. at 324. The nonmoving party need not present evidence in a form necessary for admission at trial; however, the movant may not merely rest on the pleadings. *Id.*

After a properly made motion has been properly responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Rule 56 (c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex,* 477 U.S. at 322.

The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249. A judge's guide is

the same standard necessary to direct a verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 259; *see Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 745 n.11 (1983). However, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson,* 477 U.S. at 249 (citations omitted); *accord Spence v. Zimmerman.* 873 F.2d 256 (11th Cir. 1989). Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. *Anderson,* 477 U.S. at 254; *Cottle v. Storer Communication, Inc.,* 849 F.2d 570, 575 (11th Cir. 1988). Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255. The nonmovant need not be given the benefit of every inference but only of every reasonable inference. *Brown v. City of Clewiston,* 848 F.2d 1534, 1540 n.12 (11th Cir. 1988).

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DISCUSSION

I. *Defendant Monarch's Motions for Summary Judgment*

A. *State Law Claims*

Plaintiffs Howard, Gibson, and Reogas each assert that Monarch is liable for defendant Gray's allegedly tortious behavior toward plaintiffs because Gray was acting within the scope of his employment at the time he committed the torts and because Monarch ratified Gray's conduct by failing to take corrective measures. Specifically, plaintiffs assert that Gray committed the torts of assault and battery and invasion of privacy for which Monarch is liable. Plaintiffs also assert that Monarch is liable for the negligent supervision of or failure to terminate defendant Gray.

1. *Liability for Gray's Intentional Torts*

For an employer to be liable for the intentional torts of its agent under Alabama law, the plaintiff must show: (1) that the agent's wrongful acts were in the line and scope of his employment; (2) that the acts were in furtherance of the business of the employer; *or* (3) that the employer participated in, authorized, or ratified the wrongful acts. *Potts v. BE & K Constr. Co.*, 604 So. 2d. 398, 400 (Ala. 1992); *Joyner v. BAA Cooper Transp.*, 477 So. 2d 364, 365 (Ala. 1985). According to the Alabama Supreme Court, "[t]he employer is vicariously liable for acts of its employees that were done for the employer's benefit, i.e., acts done in the line and scope of employment or for acts done for the furtherance of the employer's interest."[5] *Potts*, 604 So. 2d at 400. The employer is

5. The court notes that by defining (1) acts done in the line and scope of employment and (2) acts done for the furtherance of the employer's interest as

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"directly liable for its own conduct if it authorizes or participates in the employee's acts or ratifies the employee's conduct after it learns of the action." *Id.*

a. *Vicarious Liability*

The court first notes that plaintiff Howard's claims against Monarch for assault and battery and invasion of privacy based on *respondeat superior* are barred by the statute of limitations. Under Alabama law, "[a]ll actions commenced to recover damages for injury to the person or property of another wherein a principal or master is sought to be held liable for the act or conduct of his agent, servant, or employee under the doctrine of respondeat superior must be brought within two years." ALA. CODE § 6-2-38(n) (1993). Howard acknowledges that the last sexually offensive conduct by Gray occurred no later than February of 1992, when Gray allegedly touched her as she was leaning down to retrieve paper towels from a cabinet in his office. This suit was filed on August 10, 1994, more than two years after that incident. Therefore, Monarch cannot be held vicariously liable for Gray's conduct toward Howard. Because liability under the first two prongs of the *Potts* standard relates to vicarious liability, neither of those prongs is satisfied with regard to Howard, and Monarch can only be held liable for Gray's intentional torts toward Howard if it ratified Gray's conduct.

(Cont'd)

acts "done for the employer's benefit," the *Potts* court effectively collapsed the first two standards set forth in *Joyner* into one. This decision makes sense, given that under Alabama law, an employee is engaged in the "line and scope" of employment only if he or she is acting "'in furtherance of the employment.'" *Doe v. Swift*, 570 So. 2d 1209, 1211 (Ala. 1990) (citations omited).

Regardless of the statute of limitations, however, Monarch cannot be held vicariously liable for Gray's conduct toward any of the plaintiffs on plaintiffs' state law claims because Gray did not engage in his allegedly tortious conduct "for [Monarch's] benefits" *See Potts*, 604 So. 2d at 400 (acts done in the line and scope of employment or acts done for the furtherance of the employer's interest are those acts "done for the employer's benefit"). As the Alabama Supreme Court acknowledged in *Doe v. Swift*, 570 So. 2d-1209 (Ala. 1990), "sexual misconduct by an employee is purely personal and outside the line and scope of his employment." *Id.* at 1211. In *Swift*, for example, the court held that a psychologist assigned to a hospital was not acting in the line and scope of his employment and, therefore, for the employer's benefit when he sexually assaulted a patient. *Id.* at 1210, 1213. Similarly, in this case Gray was not acting for Monarch's benefit when he allegedly committed the torts of assault and battery and invasion of privacy against each of the plaintiffs. Rather, he was acting *against* the interests of Monarch. Therefore, Monarch cannot be held vicariously liable for Gray's allegedly tortious behavior toward the plaintiffs.

b. *Direct Liability*

The next question is whether Monarch can be held directly liable for Gray's behavior because "it authorize[d] or participate[d] in [Gray's] acts or ratifie[d] [his] conduct after it learn[ed] of the action." *See Potts*, 604 So. 2d at 400. In *Potts*, the Alabama Supreme Court established a three-pronged test to determine whether an employer has ratified one employee's sexual harassment of another employee:

> [I]n addition to proving the underlying tortious conduct of an offending employee, a complaining

> employee must show that the employer (1) had actual knowledge of the tortious conduct of the offending employee and that the tortious conduct was directed at and visited upon the complaining employee; (2) that based upon this knowledge, the employer knew, or should have known, that such conduct constituted sexual harassment and/or a continuing tort; and (3) that the employer failed to take "adequate" steps to remedy the situation.

Id. In determining whether the steps taken are "adequate," the *Potts* court stated that "if the undisputed evidence shows that the employer, as soon as it was practical to do so after learning of the conduct, took steps to stop the tortious conduct and *the tortious conduct stopped,* the steps taken by the employer were adequate, as a matter of law." *Id.* at 401 (emphasis in original).

i. *Plaintiff Karen Howard*

With regard to the alleged tortious conduct toward plaintiff Howard, Howard acknowledges that she failed to inform anyone at Monarch about Gray's conduct toward her until a couple of weeks following the incident of unpermitted touching in Gray's office. According to Howard, she was talking with Larry Puller about other matters and took the opportunity to complain about Gray's behavior. Howard also admits that following the incident in Gray's office, Gray engaged in no more sexually offensive conduct toward her. Although Howard alleges that Gray continued to harass her, his alleged harassment involved interfering with Howard's work, not making sexually explicit comments or engaging in unpermitted touching. Therefore, Howard alleges no conduct following her discussion with Puller that would even arguably give rise to a cause of action for assault and battery or invasion of privacy.

Howard suggests, however, that Monarch knew of Gray's tortious conduct toward the women he supervised based on the complaints of former employee Henrietta Fulks. Henry Stamper acknowledged that he was aware of allegations made by Fulks concerning alleged sexual impropriety on Gray's part. However, in order for an employer to be held liable for an employee's tortious conduct on the grounds that the employer ratified that conduct, *Potts* requires the plaintiff to show that the employer had "actual knowledge of the tortious conduct of the offending employee *and* that the tortious conduct was directed at and visited upon the complaining employee." ***Potts***, 604 So. 2d at 400. Under *Potts*, then, Howard must show not only that Monarch knew that Gray had engaged in tortious conduct toward other women employees, but also that Gray's "tortious conduct was directed and visited upon" Howard. The fact that Monarch was aware that a former employee complained that Gray had sexually harassed her while she was working at Monarch is not sufficient to prove that Monarch knew about Gray's allegedly tortious conduct toward Howard.

In addition, "if the undisputed evidence shows that the employer, as soon as it was practical to do so after learning of the conduct, took steps to stop the tortious conduct and *the tortious conduct stopped*, the steps taken by the employer were adequate, as a matter of law" *Potts*, 604 So. 2d at 401 (emphasis in original). In this case, Dorothy Simpson testified that following Howard's complaint, she was asked to monitor Gray's behavior. While she was not asked to counsel him about sexual harassment, nor was she qualified to do so, she was instructed to "monitor [him] and make sure that he did everything properly." (Simpson Dep. at 43-44). Most importantly, however, Howard acknowledges that "*the tortious conduct stopped*" following her conversation with Puller. ***See Potts***, 604 So. 2d

at 401. Therefore, as a matter of law, the steps taken by Monarch to prevent further harassment of Howard were adequate, and Monarch cannot be held directly liable for any prior tortious conduct engaged in by Gray.

ii. *Plaintiff Wanda Gibson*

Plaintiff Gibson acknowledges that prior to her discharge in February of 1994, she did not inform anyone in the management of Monarch about Gray's allegedly tortious behavior toward her. Although Gibson alleges that Monarch *should have known* about Gray's conduct toward her, *Potts* requires that the employer have *"actual knowledge* of the tortious conduct of the offending employee." *Potts,* 604 So. 2d at 400 (emphasis added). In addition, as stated above, the employer must know "that the tortious conduct was directed at and visited upon the complaining employee." *Id.* Because Gibson admits that Monarch did not have actual knowledge of Gray's behavior toward her until after her discharge in February of 1994, Monarch cannot be held liable for ratifying Gray's conduct.

iii. *Plaintiff Carmen Reogas*

Reogas admits that she did not complain to anyone in authority regarding Gray's allegedly tortious behavior toward her until March 22, 1994, when she filed a grievance with the Union. Reogas also acknowledges that all sexually offensive acts and remarks by Gray ceased after she filed the grievance. Because Reogas has failed to produce any evidence suggesting Monarch knew of Gray's behavior toward her prior to her grievance and because Reogas admits that any behavior giving rise to a claim for assault and battery or invasion of privacy

ceased after she filed her grievance, Monarch cannot be held to have ratified Gray's conduct under *Potts*. Therefore, as a matter of law, Monarch cannot be held liable for Gray's alleged tortious behavior.

2. *Liability for Negligent Supervision or Failure to Terminate*

In Count II of the Complaint, plaintiffs allege that Monarch is liable for the negligent supervision of defendant Gray or for the negligent failure to terminate Gray during the time plaintiffs were employed at Monarch. The only case cited by plaintiffs in support of this cause of action is *Lane v. Central Bank of Alabama*, 425 So. 2d 1098 (Ala. 1983), in which the Alabama Supreme Court acknowledged "a cause of action against the master based on the incompetence of the servant" where the master either knew or should have known of the servant's incompetence. *Id.* at 1100. As Monarch notes, however, the claims plaintiffs assert against Gray are not for incompetence, or negligence, but rather they are for intentional torts. Therefore, the tort recognized in *Lane* does not apply to this case. Furthermore, as Monarch also notes, imposing liability on an employer for the intentional torts of his or her employee based on the tort of negligent supervision would obliterate the *Potts* requirement of actual knowledge of the employee's conduct before liability can attach. Therefore, Monarch's motion for summary judgment as to Count II of the Complaint is due to be granted.[6]

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6. Because the court holds that Monarch's motion for summary judgment as to plaintiff Reogas' state claims is due to be granted on the merits, it will not address Monarch's alternative argument that Reogas' state claims are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

Appendix B

B. *Title VII Claims*

1. *Sexual Harassment*

Title VII prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ...." 42 U.S.C. § 2000e-2(a)(1). Two types of sexual harassment are recognized by the courts: *quid pro quo* sexual harassment and hostile work environment sexual harassment. *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1315 (11th Cir. 1995). When an employer alters an employee's job conditions *as a result of* the employee's refusal to submit to sexual demands, *quid pro quo* sexual harassment occurs. *Id.* (emphasis added). Hostile environment sexual harassment occurs, on the other hand, when an employer's conduct " 'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment.' " *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (citation omitted); *Steele*, 867 F.2d at 1315. In this case, plaintiffs Gibson and Reogas allege that Gray's conduct toward them constituted hostile environment sexual harassment.[7]

Hostile work environment sexual harassment occurs "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment

7. It is not clear based on the Complaint alone whether plaintiffs Gibson and Reogas allege *quid pro quo* sexual harassment or not. However, because plaintiffs Gibson and Reogas fail in their briefs to respond to Monarch's argument that plaintiffs have failed to state a claim for *quid pro quo* harassment, the court assumes that plaintiffs Gibson and Reogas concede that Gray's conduct did not constitute *quid pro quo* harassment.

and create an abusive working environment.' " *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993) (citations omitted); *Cross v. Alabama*, 49 F.3d 1490, 1507 (11th Cir. 1995). The conduct at issue must be severe or pervasive enough to create an "objectively hostile or abusive work environment" to be actionable under Title *VII. Harris*, 114 S. Ct. at 370; *see also Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (the sexual harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment"). Thus, the "mere utterance" of a remark that engenders offense does not affect the terms, conditions, or privileges of employment to a sufficient degree to violate Title VII. *Henson*, 682 F.2d at 904. In addition, whether an environment is "hostile" or "abusive" must be determined by looking at the totality of the circumstances, considering such factors as the frequency of the discriminatory conduct, the severity of the conduct, whether the conduct is physically threatening or humiliating as opposed to merely offensive, and whether the conduct unreasonably interferes with an employee's work performance. *Harris*, 114 S. Ct. at 371; *Edwards v. Wallace Community College*, 49 F.3d 1517, 1521-22 (11th Cir. 1995).

To establish a prima facie case of hostile work environment sexual harassment, a plaintiff must show: (1) that the employee belongs to a protected group; (2) that the employee was subject to unwelcome sexual harassment; (3) that the harassment complained of was based on gender; and (4) that the harassment affected a condition of the complainant's employment. *Cross*, 49 F.3d at 1504. The plaintiff must also prove that the employer is liable for the conduct of its employee through *respondeat superior. Steele*, 867 F.2d at 1316. In other words, plaintiff must show that "the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor." *Id.*

Appendix B

a. *Plaintiff Wanda Gibson*

Plaintiff Gibson has failed to produce sufficient evidence from which a reasonable jury could conclude that Monarch "knew or should have known of [Gray's] harassment and failed to take prompt remedial action against [him]." *See Steele,* 867 F.2d at 1316. Gibson contends that Gray's harassment of her and other women employees under his supervision was so pervasive that Monarch should have known about it. Although plaintiff correctly asserts that an "employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge," *Henson v. City of Dundee,* 682 F.2d 897, 905 (11th Cir. 1982), plaintiff has not produced sufficient evidence of the pervasiveness of Gray's sexual harassment, such that knowledge of that harassment may be fairly imputed to Monarch.

First, many of the alleged incidents of sexual harassment occurred outside of the workplace. Gibson alleges, for example, that Gray repeatedly called her at home between April and October of 1993, asking her for dates. Gibson does not allege that Gray placed these calls from work, and therefore, there is no evidence from which a reasonable jury could conclude that Monarch should have known about these calls. Similarly, Gibson alleges that Gray came by her home one morning, walked into her house without knocking, gave her a hug, and tried to push her onto the couch. Although this incident may understandably have made Gibson feel uncomfortable around Gray at work, there is no evidence that Monarch should have known about this incident because it took place entirely within the confines of Gibson's home.

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Other than these incidents, Gibson's claim of sexual harassment rests on her allegations that Gray told vulgar jokes and that he repeatedly brushed up against her, touched her on the leg, or leaned against her while she was working. With regard to the touching, Gibson admits that she worked in plain view of other employees. Although Gibson believed that one or two other employees had probably seen Gray touch her, she failed to produce substantive evidence that any employee had seen Gray touch her. The only employees to testify in that regard, Debra Turbyfill and Patsy Curtis, testified that they never saw any physical contact between Gibson and Gray other than the type of incidental contact that results from close quarters. In short, Gibson has failed to produce any substantive evidence suggesting that Gray's physical touching of her was so pervasive that knowledge of it could be fairly imputed to Monarch. With regard to the joking, Gibson admits that Gray told only one joke, which she found particularly vulgar. Although Gray's joke may have been distasteful, it does not establish a pattern of conduct about which Monarch should have been aware.

Finally, Gibson alleges that Monarch should have known about Gray's behavior based on Fulks', Howard's, and Reogas' complaints. According to Gibson, Gray's conduct toward the women at the plant was so pervasive and complaints about his behavior so common that Monarch knew that he was engaging in sexually harassing behavior, yet failed to stop it. Gibson, however, ignores the fact that neither she nor Reogas complained about Gray's conduct toward them until February of 1994 at the earliest. Gibson acknowledges that she did not complain about his conduct toward her until after she had been discharged in February of 1994. Similarly, Reogas acknowledges that she did not complain to anyone in authority at Monarch about Gray's behavior toward her until March 22, 1994, when she filed a

grievance. Therefore, the only indication Monarch could have had of Gray's sexually harassing conduct toward female employees was Fulks' allegation from fifteen years before and Howard's allegation of his behavior toward her. However, Howard admits that after Gray physically touched her on the buttocks, which occurred before she had informed anyone in authority at Monarch about Gray's conduct toward her, his sexually harassing behavior ceased. There is no evidence based on Howard's allegations alone that Monarch should have been aware that Gray would behave similarly toward other female employees or that he would engage in such behavior again, given that he stopped his alleged harassment of Howard in February of 1992. Gibson simply has not alleged facts showing a pervasiveness of harassment sufficient to "give[] rise to the inference of [Monarch's] knowledge" of Gray's sexually harassing behavior toward her. *See Henson, 682* F.2d at 905. Therefore, she has failed to produce sufficient evidence from which a reasonable jury could find against Monarch on Gibson's claims of sexual harassment under *respondeat superior.*

b. *Plaintiff Carmen Reogas*

Plaintiff Reogas has also failed to produce sufficient evidence from which a reasonable jury could conclude that Monarch should have known about Gray's alleged sexually harassing behavior toward Reogas. As stated above, Reogas admits that she did not complain about Gray's behavior toward her to anyone in authority at Monarch until March of 1994, and that after she filed a grievance alleging sexual harassment, Gray's sexually harassing conduct toward her ceased. Therefore, the question is whether Monarch should have known about Gray's behavior based on the pervasiveness of the incidents between Gray and Reogas or based on the pervasiveness of

Gray's sexually harassing behavior toward women employees at Monarch, in general.

First, as with Gibson, Monarch could not have known about Gray's phone calls to Reogas at her home. In addition, while Reogas contends that Gray regularly walked past her and "accidentally on purpose" hit his hand across her bottom, (Reogas Dep. at 125); that he moved so close to her when inspecting her tile that his elbow would rest on her breast; that he made occasional comments about her personal sex life; and that on one occasion he asked her to "open her blouse," there is no evidence suggesting that anyone in authority at Monarch should have been aware of Gray's behavior in this regard. It is likely that the touching alleged by Reogas was so slight as to appear incidental to an observer, and Reogas has not produced any witnesses who will testify that they saw any touching between Gray and Reogas, much less touching so pervasive as to "give[] rise to the inference of knowledge" on the part of Monarch. *See Dundee,* 682 F.2d at 905. Therefore, Reogas has failed to produce sufficient evidence of such pervasive sexually harassing conduct by Gray that a reasonable jury could conclude that Monarch should have known about Gray's alleged misconduct.

With regard to other employees' complaints about Gray's behavior, as noted above, the only evidence that Monarch had prior to February 1994 of Gray's conduct toward a female employee was Howard's complaint made over a year earlier and Fulks' complaint made fifteen years earlier. Although Stamper testified that he was aware that Fulks alleged some sexually harassing behavior by Gray fifteen years earlier, there is no evidence that he engaged in misconduct toward any other female employee until plaintiff Howard in 1992. Howard's

complaint is not sufficient evidence from which a jury could conclude that Monarch should have known about Gray's allegedly sexually harassing behavior toward Reogas because there was no evidence that Gray would behave similarly toward other employees. Therefore, like Gibson, Reogas has failed to allege a prima facie case of hostile environment sexual harassment under Title VII against Monarch.

2. *Retaliation*

In order to establish a prima facie case of unlawful retaliation in violation of Title VII, plaintiff must show: (1) that she engaged in statutorily protected expression; (2) that she experienced an adverse employment action; and (3) a causal link between the protected expression and the adverse action. *Goldsmith v. City of Atmore,* 996 F.2d 1155, 1163 (11th Cir. 1993). Once a prima facie case has been established, the defendant must come forward with legitimate, nondiscriminatory reasons for the employment action. *Id.* If the defendant offers legitimate reasons for the employment action, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the reasons offered by the defendant are pretextual. *Id.*

a. *Plaintiff Wanda Gibson*

Assuming plaintiff Gibson has alleged sufficient facts to satisfy the prima facie case requirement, her retaliation claim fails because Monarch has given a legitimate, nondiscriminatory reason for Gibson's discharge and Gibson has alleged no evidence to support a claim that Monarch's stated reason was a pretext for illegal retaliation. Monarch's stated reason for discharging Gibson was her violation of Monarch's absenteeism policy. The policy provided that any employee who had more

than twenty absences within a twelve-month period would be discharged. While Gibson alleges that the decision to terminate her employment was wrong because some of her absences were excused for medical reasons, she has presented no evidence that the true reason she was fired was because she objected to Gray's sexual advances. *See Meeks v. Computer Assoc. Int 'l*, 15 F.3d 1013, 1021 (11th Cir. 1994) (to prove retaliation under Title VII plaintiff must allege an adverse employment action *and* prove that the employer's proffered explanation is a pretext for retaliation). She acknowledges, in fact, that Gray never asked her for sex or threatened her with any job detriment if she refused social or physical contact with him. In addition, Larry Puller testified that it was his decision to terminate Gibson, not Gray's. Therefore, even if Gibson had adduced some evidence that Gray wanted her fired because she rebuffed his advances, the evidence suggests that Puller made the decision, not Gray, and Gibson has produced no evidence suggesting that Puller was retaliating against her for having engaged in protected activity when he made that decision. As a result of the lack of evidence suggesting pretext, Gibson's claim of retaliation in violation of Title VII must fail.

b. *Plaintiff Carmen Reogas*

Plaintiff Reogas also alleges that Monarch retaliated against her in violation of Title VII when she was discharged without cause. However, assuming Reogas has alleged a prima facie case of retaliation under Title VII, Monarch has given legitimate, nondiscriminatory reasons for her discharge, and Reogas has failed to produce sufficient evidence from which a reasonable jury could conclude that Monarch's stated reasons were pretextual. The evidence submitted by Monarch indicates that Reogas was fired pursuant to a provision in the CBA providing

that any combination of four offenses within one year is cause for discharge. Reogas received disciplinary notices in August of 1993 and in May of 1994, one for poor job performance and one for disregarding Gray's instructions. In June of 1994, Reogas received a third disciplinary warning, this time for excessive absences. Finally, in July of 1994, she refused to turn off a tape recorder when instructed to turn it off by Stamper and was fired for insubordination. Although Reogas asserts that she had a right to tape the meeting because she was not allowed to bring in her own representative, she has produced no evidence suggesting that she was fired because she had previously alleged that Gray sexually harassed her. Therefore, Monarch's motion for summary judgment as to Reogas' claim of retaliation in violation of Title VII is due to be granted.

C. *Hybrid Section 301 / Fair Representation Claim*

In Count V of the Complaint, plaintiffs Gibson and Reogas assert that Monarch violated Section 301 of the Labor Management Relations Act by terminating their employment in violation of the CBA. Under federal law, "[w]hen a collective bargaining agreement provides a mechanism whereby grievances are submitted to binding arbitration, a decision of the arbitrator may not normally be relitigated in federal court." *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1205-06 (11th Cir. 1982). However, the union has a duty to fairly represent the employee during the course of the grievance process, and if the union breaches that duty, "the bar to federal court review is lifted." *Id.* As the Supreme Court has recognized, where employees sue both the employer and the union, "[s]uch a suit, as a formal matter, comprises two causes of action. The suit against the employer rests in § 301, since the employee is alleging a breach of the collective bargaining agreement. The

suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act." *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151, 164 (1983). In order to succeed against discharge was contrary to the contract *and* that the union breached its duty of fair representation toward them. *Id.* at 165.

In this case, then, Gibson and Reogas must prove both that their employment was terminated in violation of the CBA and that the Union violated its duty of fair representation toward them. As discussed below in the court's discussion of the Union's motion for summary judgment, neither Gibson nor Reogas has presented sufficient evidence from which a reasonable jury could conclude that the Union breached its duty of fair representation toward them.[8] Therefore, Monarch's motion for summary judgment as to Gibson's and Reogas' claim under Section 301 of the Labor Management Relations Act is due to be granted.

II. *Defendant Union's Motion for Summary Judgment*

In Count VI of the Complaint, plaintiffs Gibson and Reogas allege that the Union breached its duty of fair representation toward them. Under the doctrine of fair representation, "a union must represent fairly the interests of all bargaining-unit members during the negotiation, administration, and enforcement of collective-bargaining agreements." *International Bhd. of Electrical Workers v. Foust,* 442 U.S., 42, 47 (1979). As the

8. The court notes that plaintiffs Gibson and Reogas have presented no evidence that their terminations were in violation of the CBA. Therefore, even if the court found that the Union had violated its duty of fair representation, it would still find that Monarch's motion for summary judgment as to their Section 301 claim is due to be granted.

Eleventh Circuit has recognized, "[t]he nature of the duty of fair representation which a Union owes its members is determined by considering the context in which the duty is asserted." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988). Therefore, "the duty of fair representation in the context of negotiations may be determined by a different standard than is the duty owed in the processing of grievances or ratification of the concession agreements." *Id.* at 1519-20. In order to establish that the union has breached its duty of fair representation in the context of the grievance process, "the employee must show that the union's handling of the grievance was either arbitrary, discriminatory, or done in bad faith." *Id.* at 1520. Unions are allowed "considerable latitude" in their representation of employees, and "[c]ases are uniform in holding that neither negligence on the part of the union nor a mistake in judgment is sufficient to support a claim that the union acted in an arbitrary and perfunctory manner." *Harris*, 668 F.2d at 1206.

A. *Plaintiff Wanda Gibson*

Plaintiff Gibson has failed to provide sufficient evidence from which a reasonable jury could conclude that the Union's handling of her grievance was "arbitrary, discriminatory, or done in bad faith." *See Parker*, 855 F.2d at 1510. Gibson alleges that she was not adequately informed of the grievance process or provided with grievance forms by the Union. In addition, she alleges that she did not know about the 20-day limit on absences and that union representative Dorothy Simpson told her that she would lose her job if she filed a grievance. However, these allegations, if true, amount at most to an allegation of negligence on the part of the Union. Here, the Union agreed to arbitrate Gibson's claim and represented Gibson at the arbitration hearing, despite the fact that Gibson refused to testify on her

own behalf at the hearing. In addition, although the arbitrator ultimately held that Gibson's claim was untimely, the Union submitted a post-hearing brief in her support. Gibson has presented no evidence of bad faith on the part of the Union or that its handling of her grievance was arbitrary or discriminatory. Therefore, the Union's motion for summary judgment as to Gibson's claim against it is due to be granted.

B. *Plaintiff Carmen Reogas*

Plaintiff Reogas asserts that the Union breached its duty of fair representation to her by discouraging her from filing a grievance against defendant Gray, by failing to adequately represent her when she did file a grievance, and by failing to adequately represent her during the meeting that led ultimately to her termination. In particular, Reogas alleges that Simpson told her that if she crossed Gray she would lose her job, thereby discouraging Reogas from filing a grievance. She also alleges that at her meeting with Monarch officials concerning her grievance against Gray, she was not permitted to call witnesses and A.Q. Harville, the Union's representative, did not insist that she be permitted to call witnesses. Finally, Reogas asserts that Simpson inadequately represented her interests at the meeting at which Reogas was fired.

Even if these allegations are true, Reogas has alleged, at most, that the Union was negligent in its representation of her. Reogas has presented no evidence suggesting that she had a right to present witnesses at the meeting with Monarch officials involving her grievance against Gray. If she had no such right, the Union was not even negligent in failing to demand it, much less acting in bad faith. In addition, Reogas seems to overlook the fact that the Union took her grievance against Gray all the

way to arbitration and attempted to represent her there, despite her refusal to testify because her lawyer could not be present. Although Dorothy Simpson may have been negligent in failing to more vigorously represent Reogas, there is no evidence that her conduct was arbitrary, discriminatory, or in bad faith. Therefore, Reogas has failed to produce sufficient evidence from which a reasonable jury could conclude that the Union breached its duty of fair representation toward her, and the Union's motion for summary judgment is due to be granted.

III. *Defendant Gray's Motion for Summary Judgment*

In the Complaint, each of the plaintiffs asserts claims for assault and battery and for invasion of privacy against defendant Gray. Upon consideration of the evidence, the court concludes that Gray's motion for summary judgment as to plaintiff Gibson and plaintiff Reogas is due to be granted, and Gray's motion for summary judgment as to plaintiff Howard is due to be granted in part and denied in part.

A. *Assault and Battery*

Under Alabama law, battery is the "touching of another person in a hostile manner." *Wright v. Wright*, 654 So. 2d 542, 544 (Ala. 1995). As the Alabama Supreme Court has stated, " '[*t*]*he wrong here consists, not in the touching, so much as in the manner or spirit in which it is done. . . . Thus, to lay hands on another in a hostile manner is a battery, although no damage follows*; but to touch another, merely to attract attention, is no battery and not unlawful.' " *Surrency v. Harbison*, 489 So. 2d 1097, 1104 (Ala. 1986) (emphasis in original) (quoting *Singer Sewing Machine Co. v. Methvin*, 63 So. 997, 1000 (Ala. 1913)).

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1. *Plaintiff Karen Howard*

Although Howard's brief in opposition to Gray's motion for summary judgment does not argue the merits of her claim for assault and battery,[9] the court assumes that her claim is based on the single incident of physical touching between Gray and Howard. Howard alleges that when she bent down to get some towels out of a cabinet in Gray's office some time before February of 1992, Gray "popped [her] on the butt with his hand. (Howard Aff. ¶ 1). Although Gray denies touching Howard at all, a question of fact exists as to whether he touched her and, if so, whether he touched her in the "hostile manner" required for liability under Alabama law.

Gray argues, however, that Howard's claim for assault and battery is precluded under the exclusivity provisions of the Alabama Worker's Compensation Act. Although Gray is correct that an assault that "[arises] out of and in the course of employment" may form the basis of a civil cause of action under the worker's compensation statute, an assault based solely on personal feelings, such as feelings of ill will or hatred, does not arise out of and in the course of employment. *Austin v. Ryan's Family Steakhouses, 1995* WL 444291, at *1-*2 (Ala. Civ. App. July 28, 1995). As discussed above in the context of vicarious liability, "sexual misconduct by an employee is purely

9. In both Gray's brief in support of his motion for summary judgment and in plaintiffs' brief in opposition, the parties focus on the statute of limitations as it applies to the single incident of battery alleged by plaintiff Howard. Although Gray argues that the statute of limitations is two years under Alabama Code § 6-2-3 8(1), which provides a general two-year statute of limitations for all actions for personal injury not specifically enumerated in that section, plaintiff Howard correctly asserts that the proper statute of limitations is six years, as provided in Alabama Code § 6-2-34, which specifically enumerates assault and battery.

personal and outside the line and scope of his employment." *Swift, 570* So. 2d at 1211. Therefore, Howard's claim is not precluded by the exclusivity provisions of the Alabama Worker's Compensation Act, and Gray's motion for summary judgment as to Howard's claim for assault and battery is due to be denied.

2. *Plaintiffs Wanda Gibson and Carmen Reogas*

Plaintiff Gibson alleges that Gray regularly brushed up against her, leaned against her with his body, and "touch[ed her] on the leg or something like that." (Gibson Dep. at 45). Similarly, plaintiff Reogas asserts that Gray would move close to her when inspecting tile so that his elbow would hit her breast and would regularly walk past her and "accidentally on purpose" hit his hand across her bottom. (Reogas Dep. at 125). As stated by the Alabama Supreme Court, battery consists " *'not in the touching, so much as in the manner or spirit in which it is done.'* " *Surrency,* 489 So. 2d at 1044 (citation omitted). In this case, neither Gibson nor Reogas has alleged that Gray touched her in a hostile manner, and the facts alleged by them do not suggest that the touching may have been done in a hostile manner. Therefore, Gray's motion for summary judgment with respect to Gibson's and Reogas' claims for assault and battery is due to be granted.

B. Invasion of Privacy

The Alabama Supreme Court has recognized that " *'the wronged intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities'* " constitutes a tortious invasion of privacy. *Busby v. Truswal Sys.Corp., 551* So. 2d 322, 323 (Ala. 1989) (emphasis in original) (citations omitted).

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"One may invade another's privacy through either an intrusion upon a physical space, such as a trespass, or by an invasion of one's 'emotional sanctum.' " *Carter v. Innisfree Hotel, Inc.*, 1995 WL 277328, at *3 (Ala. May 12, -1995). In addition, "marriage" and "sexual" concerns have been recognized as fundamental rights, entitled to privacy protections. *Phillips v. Smalley Maintenance Services, Inc.*, 435 So. 2d 705, 708 (Ala. 1983).

1. *Plaintiff Karen Howard*

Under Alabama law, the statute of limitations for invasion of privacy is two years. ALA. CODE § 6-2-38(1) (1993). In this case, the last incident which could even arguably give rise to a claim for invasion of privacy by plaintiff Howard against Gray occurred no later than February of 1992. This suit, however, was not filed until August 10, 1994. Therefore, more than two years has elapsed between the conduct and the suit, and Gray's motion for summary judgment as to Howard's claim for invasion of privacy is due to be granted on the grounds that her claim is barred by the statute of limitations.

2. *Plaintiff Wanda Gibson*

Plaintiff Gibson alleges an invasion of privacy based on Gray's conduct toward her. In particular, Gibson alleges that Gray regularly brushed up against her, leaned his body against hers, called her at home asking for dates, asked questions about her personal life, told at least one vulgar joke in front of her, and came by her home one morning and tried to hug her. Plaintiff is correct that some conduct which gives rise to a claim of sexual harassment can also give rise to a claim of invasion of privacy. For example, in *Busby* the defendant supervisor made numerous sexually explicit comments to the plaintiffs, openly

propositioning them and physically touching them. *Busby, 551 So.* 2d at 324. The court held that based on the evidence in that case a jury could reasonably determine that the supervisor "pried or intruded into the plaintiffs' sex lives in an offensive or objectionable manner and thereby invaded their right of privacy." *Id.* Similarly, in *Phillips,* the evidence showed that the defendant supervisor began harassing the plaintiff by asking explicit questions about her sex life. *Phillips,* 435 So. 2d at 707. Eventually, the supervisor in *Phillips* insisted that the plaintiff engage in oral sex with him at least three times a week and terminated her after she consistently refused. *Id.* As in *Busby,* the *Phillips* court held that the plaintiff had stated a cause of action for the invasion of privacy. *Id.* at 711.

In *Mclsaac v. WZEW-FM Corp.,* 495 So. 2d 649 (Ala. 1986), however, the Alabama Supreme Court held that the plaintiff had not alleged sufficient facts to support a claim for invasion of privacy, where the plaintiff alleged that the defendant asked her if she would have an affair with him, repeatedly touched her in a way that the plaintiff found sexually suggestive, and tried to kiss her when the plaintiff drove him to the airport. *Id.* at 650. Although the *Mclsaac* court recognized that " '[t]he invasion may be physical intrusion into a place in which the plaintiff has secluded [herself], as when the defendant forces his way into the plaintiff's room in a hotel or insists over plaintiff's objection in entering [her] home,' " the court held that the alleged intrusion and examination into the plaintiff's concerns fell short of that required to constitute the tort of invasion of privacy. *Id.* at 651-52 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

In this case, Gibson admits that Gray never directly propositioned her for sex or suggested that if she agreed to go

on a date with him the purpose would be for sex. Although Gibson alleges that Gray asked questions about her personal life, the most explicit example she could remember was when Gray asked her whether she had had "a honeymoon last night." (Gibson Dep. at 26). While even implicitly asking about the sexual behavior of a subordinate is inappropriate in the workplace, the type of questions asked by Gray do not approach the sexually explicit nature of the comments made by the defendant in *Busby.*[10]

Gibson also alleges that Gray came by her home one morning, walked in without knocking, gave her a hug, and tried to push her onto the couch. Although this incident comes the closest to constituting an invasion of privacy, particularly because it occurred in Gibson's home, Gibson acknowledges that when she asked Gray to leave, he did, and there is no suggestion that he "force[d] his way" in or "insist[ed] over [Gibson's] objection in entering [her] home." *McIsaac,* 495 So. 2d at 652. In addition, there was evidence that although Gray regularly called Gibson at her home and asked her for dates, Gibson also called Gray at his home. While Gray's behavior toward Gibson was objectionable, it did not rise to such a level *"as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."* Therefore, Gray's motion for summary judgment as to Gibson's claim for invasion of privacy is due to be granted.

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10. For example, the supervisor in *Busby* told the plaintiffs that he would "put a stick on their machines" so they could masturbate while working, stated that he wished the plaintiffs would come to work braless and wear less clothing, asked one of the plaintiffs if she would accompany him to the restroom and hold his penis while he urinated, and openly stared at the plaintiffs' sexual anatomy. *Busby,* 551 So. 2d at 324.

Appendix B

3. *Plaintiff Carmen Reogas*

Finally, plaintiff Reogas alleges that defendant Gray made comments about her personal life, asking her if she had gotten pregnant over the weekend and stating that her boyfriend would never marry her because "[h]e's getting exactly what he wants." (Reogas Dep. at 88). She also alleges that he called her home twice and on one occasion asked her to open her blouse so that he could see. Finally, she alleges that he regularly brushed up against her, stood close to her when inspecting tile so that his elbow rested on her breast, and "accidently on purpose" hit his hand across her bottom.

Although Gray's behavior toward Reogas may have been offensive, it is not sufficient to constitute an actionable invasion of her privacy. Gray never directly propositioned Reogas, and although he asked her to open her blouse and physically brushed up against her or hit his hand across her bottom, these actions do not rise to the level required by *Busby* and *Phillips* — that is, they are not so offensive that they would outrage or cause mental suffering to a person of ordinary sensibilities. The conduct held actionable in *Busby* and *Phillips* was substantially more egregious than Gray's conduct in this case. While less egregious behavior than that alleged in *Busby* and *Phillips* may give rise to a cause of action for invasion of privacy, Gray's alleged conduct does not give rise to such an action. Therefore, Gray's motion for summary judgment as to Reogas' claim for invasion of privacy is due to be granted.

Appendix B

CONCLUSION

Plaintiffs' evidence raises no genuine issues of material fact regarding their claims against Monarch and the Union. Plaintiff Gibson's and plaintiff Reogas' evidence raises no genuine issues of material fact regarding their claims against Gray. Plaintiff Howard's evidence does raise a genuine issue of material fact with regard to her claim for assault and battery against Gray but not with regard to her claim against Gray for invasion of privacy.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHWESTERN DIVISION FILED MARCH 21, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

CASE NO. CV 94-B-2216-NW

REOGAS, et al.,

Plaintiff,

v.

GRAY, et al.,

Defendant.

ORDER

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is hereby **ORDERED** that the motions for summary judgment filed by defendant Monarch Title, Inc. and the Aluminum Brick and Glass Workers International Union Local No. 511 are **GRANTED**, as no genuine issue of material fact exists herein and defendants are entitled to judgment as a matter of law. It is further **ORDERED** that defendant Jimmy Gray's motion for summary judgment as to the claims of plaintiffs Wanda Gibson and Carmen Reogas is **GRANTED** and that his motion as to plaintiff Karen's Howard's claim for invasion of privacy is **GRANTED**. Defendant Jimmy Gray's motion for summary judgment as to plaintiff Karen

Appendix C

Howard's claim for assault and battery is **DENIED**. The motion to dismiss filed by defendant Monarch Title, Inc. is **MOOT**.

DONE this 21st of March, 1996.

s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 10, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-6767

CARMEN REOGAS, WANDA GIBSON, KAREN HOWARD,

Plaintiffs-Appellants,

versus

JIMMY GRAY, MONARCH TILE, INC.,

Defendants-Appellees,

ALUMINUM BRICK AND GLASS WORKERS INTERNATIONAL UNION, Local No. 511,

Defendant.

On Appeal from the United States District Court for the Northern District of Alabama

BEFORE: DUBINA, Circuit Judge, HILL and GIBSON*, Senior Circuit Judges.

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* Honorable John R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix D

PER CURIAM:

The petition(s) for rehearing filed by the Appellants, Carmen Reogas, Wanda Gibson, and Karen Howard, is DENIED.

ENTERED FOR THE COURT:

s/ James C. Hill
UNITED STATES CIRCUIT JUDGE